

**MINUTES OF THE
GREENSBORO BOARD OF ADJUSTMENT
REGULAR MEETING
OCTOBER 24, 2005**

The regular meeting of the Greensboro Board of Adjustment was held on Monday, October 24, 2005 in the City Council Chamber of the Melvin Municipal Office Building, commencing at 2:00 p.m. The following were present: Chair Hugh Holston, Sandra Anderson, Ann Buffington, John Cross, Jim Kee, Russ Parmele and Rick Pinto. Bill Ruska, Zoning Administrator, Zoning Inspector Barry Levine, and Blair Carr, Esq., from the City Attorney's Office, were also present.

Chair Holston called the meeting to order and explained the policies and procedures of the Board of Adjustment. He further explained the manner in which the Board conducts its hearings and the method of appealing any ruling made by the Board. Chair Holston also advised that each side, regardless of the number of speakers would be allowed a total of 20 minutes to present evidence.

APPROVAL OF MINUTES OF LAST MEETING

Mr. Cross moved approval of the September 26, 2005 minutes as written, seconded by Ms. Buffington. The Board voted 7-0 in favor of the motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto. Nays: None.)

Mr. Ruska was sworn in as to all testimony given by him for matters on the agenda.

OLD BUSINESS

APPEAL OF NOTICE OF VIOLATION

- A) **BOA-05-31: 2627 STRATFORD ROAD - FAINA BOCHKIS APPEALS A NOTICE OF VIOLATION IN REFERENCE TO A HOME OCCUPATION NOT OPERATING UNDER THE CURRENT REGULATIONS IN REGARDS TO HAVING MORE THAN ONE COMMERCIAL VEHICLE AT THE LOCATION. CONTINUED FROM THE AUGUST 22 AND SEPTEMBER 26, 2005 MEETINGS. SECTION 30-5-2.47, PRESENT ZONING- RS-9, BS-51, CROSS STREET-DAVID CALDWELL DRIVE. (INSPECTOR UPHELD - APPEAL DENIED)**

Mr. Ruska said this first agenda item was one that was continued from last month and each Board member has a copy of the minutes and the action on that for the continuance. He said he did not believe there was anyone present this afternoon on that matter. This morning Mr. Fields was out there and the people are still living at the property.

Mr. Cross said usually they had some findings of fact that they read into the record and they the Board incorporated those by reference. Could they just incorporate the findings of fact as read into the record at the last meeting?

Counsel Carr said the Board could adopt those findings.

Mr. Parmele asked if the trucks were still parked on this property this morning?

Inspector Ron Fields, 4005 Landerwood Drive, was sworn or affirmed. He talked to the next-door neighbor who said that they were still there last night and the trucks had just left.

Mr. Cross said in the matter of BOA-05-31, he moved that the Zoning Administrator's findings of fact from the prior meeting be incorporated into the record by reference, and based on those findings, he moved that the Zoning Enforcement Officer be upheld. Mr. Parmele seconded the motion.

Mr. Parmele pointed out that he thought this situation dates back to approximately June 16th. He thought there had been several postponements, a continuation and clearly he thought the time had come when the Board needed to go forward with it.

Chair Holtons said there was a motion by Mr. Cross, seconded by Mr. Parmele. The Board voted 7-0 in favor of the motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto. Nays: None.)

B) BOA-05-37: 237 SOUTH ELM STREET - DAVID HILL APPEALS A NOTICE OF VIOLATION IN REFERENCE TO AN OUTDOOR ADVERTISING SIGN (BILLBOARD) WHICH IS PROHIBITED IN THE CENTRAL BUSINESS ZONING DISTRICT. CONTINUED FROM THE SEPTEMBER 26, 2005 MEETING. (A REQUEST TO CONTINUE THIS APPEAL TO THE NOVEMBER MEETING HAS BEEN RECEIVED). SECTION 30-5-5.6(H)(3), PRESENT ZONING-CB, BS-1, CROSS STREET-EAST WASHINGTON STREET. (INSPECTOR UPHELD)

Mr. Ruska said staff received a letter dated October 3rd of this year from David Hill who is the appellant. He stated, "After attending the BOA meeting on September 26, I was granted a 30-day continuation. Unfortunately, I will be out of town for the entire week of the October Board of Adjustment meeting." He was asking for a continuance to the November meeting.

Chair Holston asked if Mr. Ruska knew if there had been any activity on that at all, as far as conversations or meetings?

Mr. Ruska said his understanding is that there is a rough draft of an amendment that is in the process of being prepared. He had not seen it yet.

In response to a question from Mr. Cross, Mr. Ruska said the amendment presumably was to allow that type of sign. As he said, he had not seen it yet.

In response to a question from Mr. Pinto, Mr. Ruska said as a staff member he could not continue the case. Only the Board can continue it. He said Mr. Hill understood that only the Board could continue the matter.

Mr. Cross said his frustration with this was that Mr. Hill came here last time and it sounded like he couldn't testify because he didn't know what was going on and he needed someone from DGI to come and do it for him. He didn't understand why Mr. Hill could not send someone else to stand in for him. He was inclined to give him the 30 days.

There was a general discussion among the Board members and they especially discussed Mr. Hill's not having anyone present today to represent him.

Mr. Cross said that in the matter of BOA-05-37, 237 South Elm Street, he moved that the Board grant Mr. Hill a continuance for 30 days or until the November Board of Adjustment meeting on the condition that the signs are not projected during the 30-day period. Mr. Pinto seconded the motion. The Board voted 2-5 in favor of the motion, denying it. (Ayes: Cross, Pinto. Nays: Holston, Anderson, Buffington, Kee, Parmele.)

Chair Holston said the motion for continuance did not pass.

Mr. Pinto said that in the matter of BOA-05-37, based on the stated findings of fact by the Enforcement Officer as read into the record at the last meeting, which were incorporated herein by reference, he would move that the Zoning Enforcement Office be upheld. Ms. Buffington seconded the motion. The Board voted 7-0 in favor of the motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto.)

C) BOA-05-40: 3608-B WEST WENDOVER AVENUE - VENUS THE UNIQUE BOUTIQUE INC. APPEALS A NOTICE OF VIOLATION IN REFERENCE TO THE USE OF THE PROPERTY FOR A SEXUALLY ORIENTED BUSINESS. CONTINUED FROM THE SEPTEMBER 26, 2005 MEETING. SECTIONS 30-5-2.7(3)(A)(B), 30-5-2.73.5(A)(1), AND CONDITIONAL DISTRICT HB #2952, PRESENT ZONING-CD-HB, BS-115, CROSS STREET-CAMANN STREET. (CONTINUED TO NOVEMBER MEETING)

Seth R. Cohen, Esq., was sworn in and said he represented the bookstore. He had a motion to dismiss this before the facts because what they are charged with, the Section numbers do not exist in the City Code. He believed Zoning would have to go back and send another Notice of Violation and set another hearing.

Mr. Ruska said Mr. Cohen was correct. There is no Section (A)(1). There is a Section (B)(1).

Mr. Cohen said under the procedure of due process, they have a right to Notice and they do not have Notice.

Counsel Carr said you could also construe the Notice to be all words and/or numbers on the page. So you as a Board can decide that, regardless of the misnumbering of the violation, if there are sufficient words to constitute Notice of the Violation, then they would be properly noticed. And that is a judgment call for the Board.

Ms. Buffington moved that BOA-05-40, 3608-A West Wendover Avenue, be continued until the November meeting at which time he will have had to have been served the proper notice. Mr. Kee seconded the motion.

Mr. Pinto said as a friendly amendment, let's just say subject to the petitioner being properly noticed.

Ms. Buffington accepted the friendly amendment. The Board voted 7-0 in favor of the amended motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto. Nays: None.)

It was suggested that when the petitioner was re-noticed to put both Notices of Violation on the agenda. That way the Board could dismiss this particular one and hear the second one.

Counsel Carr said the second notice would probably not have another case number. It would be just like an amended complaint.

NEW BUSINESS

VARIANCE

A) BOA-05-41: 2200 NELSON STREET - J & N NEW HOME BUILDERS, INC. REQUESTS A VARIANCE FROM THE MINIMUM STREET SETBACK. VIOLATION: A PROPOSED GARAGE BUILDING WILL ENCROACH 15 FEET INTO A 25-FOOT STREET SETBACK. TABLE 30-4-6-5, PRESENT ZONING-LI, BS-15, CROSS STREET-RALEIGH STREET. (GRANTED)

Mr. Ruska said J & N New Home Builders, Inc. is the owner of the property located at 2200 Nelson Street. The property is located on the south side of Nelson Street south of East Market Street on zoning map block sheet 15. The lot is currently zoned LI. The applicant is proposing to construct a garage on the vacant site. The new building will encroach 15 feet into a 25-foot setback from Nelson Street. The lot is unique in shape. The depth of the lot averages 86 feet and the width averages 453 feet. The width is five times greater than the depth. The applicant is proposing to construct a building that like the lot has much more width than depth. The building is proposed to be 29.68 feet deep and 166.67 feet wide. Nelson Street is a short dead-end street that only serves a few properties (appears to be 3 or 4 properties that use Nelson Street as legal road frontage). The Norfolk Southern Railroad Company has a railroad easement across a portion of this property. Structures, along with required parking spaces are not permitted in their easements, unless they grant a permission letter. The railroad easement is slightly angled across the property and encroaches approximately 52 feet into the width of the property. When you factor in the required street setback, the building envelope becomes almost nonexistent. The applicant will also need to provide the required parking spaces with backup aisles, travel flow, etc. for the proposed garage use. Any encroachment of the travel flow that will encroach into the railroad easement will need to be granted a permission letter from Norfolk Southern Railroad. The proposed site development will have to be approved by Technical Review Committee (TRC) prior to the issuance of any building permit. The properties on the north side of Nelson Street are LI and GB, the adjacent properties located to the east and west are zoned LI and the property located to the south is zoned RM-18.

Chair Holston opened the public hearing.

Jesse Morehead, 600 Willow Oak Drive, was sworn or affirmed. He said Mr. Ruska had told the Board basically everything that there was to say about it. He wanted to put a building in it, but they

can't put a building with the setback that's required by the City. Right now, it is a nuisance because everybody's driving in at night, dumping and it is costing them to keep it cleaned. They just need to go ahead and develop it.

Chair Holston asked if he were here really because of the railway and also the dimensions of the lot; is that correct?

Mr. Morehead said yes, they only have 58-feet on the widest side of the lot in order to build in from the railroad right-of-way.

Ms. Buffington asked if he had received permission from Southern Railroad yet?

Mr. Morehead said he had not. If he can get the setback, he won't need the property in the railroad's right-of-way.

Mr. Parmele asked if the applicant would still have to go through the current approval process with parking and things of that nature?

Mr. Ruska said that was correct. The TRC would have to review the site development plan. Without a variance from the Board of Adjustment, there would be no need of him going to the TRC.

In response to a question from Mr. Parmele, Mr. Morehead said the railroad wasn't giving up any right-of-way. He had explored that option.

Ms. Anderson asked if this were behind his office building or is it next door to it?

Mr. Morehead said it was behind the office building. It was a dead-end street on both ends. One end is privately owned and the other end belongs to the railroad.

Mr. Pinto asked if there were a reason why the proposed garage could not angle along Nelson Street at the same angle because one end of the proposed garage has over 27-feet of setback so that's plenty. The railroad right-of-way kind of curves around the back of that portion so it looked to him that if you angle the garage to some degree such that the line would run parallel to Nelson Street, you might not even need the variance.

Mr. Morehead said looking at it from the garage side from the 58-feet, from there over it goes down to about 25-feet or something like that. He said the proposed garage would be 28 by 60-feet, it would encroach into the setback. The railroad right-of-way prevented the garage being parallel with Nelson Street. He could go back only to the railroad right-of-way. He had a drawing of the railroad easement.

A general discussion ensued with the Board members asking Mr. Morehead and Mr. Ruska questions, which were answered by them.

Chair Holston asked if there were anyone present to speak in opposition to this request. There being none, he closed the public hearing.

Mr. Pinto said in BOA-05-41, 220 Nelson Street, based on the stated findings of fact and incorporating the findings of fact read into the record by the Zoning Administrator, he moved that the Zoning Enforcement Officer be overruled and the variance granted based on the following: 1) There are significant practical difficulties and unnecessary hardships that would result from carrying out the strict letter of this ordinance, specifically because of the configuration of the lot and the right-of-way that the railroad has, it is almost impossible to put any building on the lot without changing the setback; 2) The setback problem is only in one corner of the building because it actually angles back out so it is not as severe as granting a 15-foot variance across the entire length of the building; 3) The hardship is not one of the applicant's own making; 4) There are unique circumstances as outlined in the findings of fact; 5) If we do not grant the easement, as a practical matter no building could be put on the property and no reasonable use could be made of the property. The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit and the granting of the variance assures public safety or welfare and does substantial justice. For those reasons, he moved that the Zoning Office be overruled and the variance granted. Ms. Anderson seconded the motion. The Board voted 7-0 in favor of the motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto. Nays: None.)

B) BOA-05-42: 623 WOODLAND DRIVE - ARTHUR AND EMILLIE SAMET REQUEST A VARIANCE FROM THE SIDE STREET SETBACK REQUIREMENT, WHICH IS 15 FEET FROM THE PROPERTY LINE OR 40 FEET FROM THE CENTERLINE (WHICHEVER IS GREATER). VIOLATION: A PROPOSED ATTACHED ROOM ADDITION WILL ENCROACH 2.74 FEET INTO A 15-FOOT SIDE STREET SETBACK FROM CLEBURNE STREET. TABLE 30-4-6-1, PRESENT ZONING-RS-12, BS-10 & 27, CROSS STREET-CLEBURNE STREET. (GRANTED)

Mr. Cross said he would have to recuse himself from this particular case due a conflict of interest since Derek Allen was one of his partners. Mr. Cross's request was granted by unanimous consent 6-0-1. (Ayes: Holston, Anderson, Buffington, Kee, Parmele, Pinto. Nays: None. Abstain: Cross.)

Mr. Ruska said Arthur and Emillie Samet are the owners of the property located at 623 Woodland Drive. The lot is located at the southeastern intersection of Woodland Drive and Cleburne Street on zoning map block sheets 10 & 27. The property is zoned RS-12. The lot contains a single-family dwelling and a detached garage. The applicant is proposing to attach a bedroom addition that will encroach 2.74 feet into a 15-foot side street setback from Cleburne Street. The lot is a corner lot and is rectangular shaped. The lot line adjacent to Cleburne Street has a slight angle. The existing single-family dwelling is constructed at an angle. The existing driveway is located adjacent to the Cleburne Street right-of-way. The adjacent properties are also zoned RS-12.

Chair Holston opened the public hearing,

Derek Allen, Esq., with the Brooks Pierce Law Firm, 230 North Elm Street, was sworn or affirmed. He stated they represent Arthur and Emillie Samet, who are the applicants for this variance. They recently purchased this home at 623 Woodland Drive. This home was built in 1933. Part of the renovations being made involve taking off an existing extension to this home that is made out of siding that is deteriorating and putting on a matching addition. He said he would hand up a couple of materials that would make it easier for the Board to follow along with what they were going over.

The first item is an elevation drawing and the second is a group of photographs of the subject

property and surrounding properties. He also had a diagram that shows the survey lines and the area of encroachment into the setback. He then explained the importance of the items handed up for the Board's information. He said the current extension to the house came right up to the edge of the 15-foot setback. He explained that on the triangular area shown on the drawing was .22-feet at the front closer to Woodland Drive and 2.74-feet encroaching at the back. That has since been reduced so that at the front of the home, there is no encroachment and at the rear of the home, it is about 2.5-feet. He said the reason the variance is needed for this extension is really two-fold: 1) a new foundation has to be built because of the heavier materials that will be used; the brick is heavier so it is going to go outside of the existing foundation; 2) if you look on that photo in the front of the packet, there is a chimney there. When you look at the inside drawings and diagram of that master bath that this extension will be utilized for, in order to make that handicapped accessible it is going to require that extra two feet or so.

The Samets went around to each of the neighboring homes at least two houses down in all directions. Of those 15 homes, they were able to contact 13 of the folks. All 13 of the folks were very emphatic in their support of getting rid of this existing hardboard siding extension and replacing it with brick that would match the house. The neighbors also complained about the fence in the front yard and the Samets would move the fence back so that it is even with the lot lines. He said there were several homes in the same non-conforming situations in terms of setbacks. In the 1930s when these homes were built, there were no setbacks. He then walked the Board through the photos he had presented.

Mr. Allen explained how this request for a variance met the criteria set forth in the ordinance.

Arthur Samet, 623 Woodland Drive, was sworn or affirmed. He said there was actually a bathroom in that area currently that doesn't conform or is not handicapped accessible. If this were approved for the time being, the first floor would basically be a sunroom for the time being, but would provide for the plumbing that is currently there to be able to do a bathroom as well. The addition is 13 feet 8 inches across the front. They wanted to make a 1930's bathroom into a 2005 bathroom. It could not be made handicapped accessible without adding the additional space. That was because of the distance requirements between the sink and the commode and the shower door and the sink. That was driven by the placement of the chimney.

Chair Holston asked if there were anyone here to speak in opposition to this request and no one came forward. Chair Holston then closed the public hearing.

Ms. Buffington said in BOA-05-42, based on the stated findings of fact and discussion, which will be a part of this, she moved that the Zoning Enforcement Officer be overruled and the variance granted based on the following: 1) she did not think there was any other use that could benefit the property at that site; 2) the hardship does result from the unique positioning of the street and of the house, which is beyond the applicant's control; 3) the hardship results from the application of the ordinance as it is written now and is not the result of the applicant's own actions because the house was built in 1933. She thought that the biggest point here is that the variance is in harmony with the general purpose and intent and spirit of the ordinance and also the neighborhood and the general look. Mr. Parmele seconded the motion. The Board voted 6-0-1 in favor of the motion. (Ayes: Houston, Anderson, Buffington, Kee, Parmele, Pinto. Nays: None. Abstain: Cross.)

SPECIAL EXCEPTION

A) BOA-05-43: 512 HARGETT STREET - JOHN SPRUILL REQUESTS A SPECIAL EXCEPTION AS AUTHORIZED BY SECTION 30-5-2.37(B) TO ALLOW A SEPARATION OF 950 FEET FROM ONE FAMILY CARE HOME (6 OR LESS PERSONS) TO ANOTHER FAMILY CARE HOME (6 OR LESS PERSONS) WHEN 1,320 FEET IS REQUIRED. PRESENT ZONING-RS-12, BS-5, CROSS STREET-EAST LEE STREET. (DISMISSED)

Chair Holston said it appeared there was no one present to speak to this request.

Mr. Ruska said the Board could continue the matter or the Board could dismiss it for failure to show and support the request.

Mr. Kee asked if staff received any information on this, a letter requesting continuance of anything like that?

Mr. Ruska said staff had heard nothing about this item.

Ms. Buffington moved that BOA-05-53, 512 Hargett Street, be dismissed due to the fact that Mr. Spruill did not attend the Board of Adjustment meeting. Mr. Pinto seconded the motion. The Board voted 7-0 in favor of the motion. (Ayes: Holston, Anderson, Buffington, Cross, Kee, Parmele, Pinto. Nays: None.)

APPEAL OF NOTICE OF VIOLATION

A) BOA-05-44: 3129 WEST FRIENDLY AVENUE - STEVE UWANAWICH AND DOREEN GORDON APPEAL A NOTICE OF VIOLATION IN REFERENCE TO A HOME OCCUPATION THAT IS IN VIOLATION OF THE HAMILTON LAKES MERGER AGREEMENT. SECTION 30-5-2.47, PRESENT ZONING-RS-12, BS-47, CROSS STREET-AVONDALE DRIVE. (INSPECTOR UPHELD)

Counsel Carr said there was one procedural issue for the Board to decide and this actually may be a jurisdictional issue. This case or this violation arises out the unique circumstance in which the City of Greensboro in 1957 annexed the Town of Hamilton Lakes. Part of that annexation agreement was to uphold all of the Town of Hamilton Lakes's zoning ordinances that were in place at that time, one of which was the prohibition within this geographic area of any home occupations. So the question before the Board is: Is the applicant requesting a use variance? If so, that would be prohibited by the annexation merger agreement. The Board could certainly hear from the applicant their rationale for the request.

Chair Holston asked Attorney Isaacson if he were prepared to speak on that and Attorney Isaacson said he was.

Mr. Ruska said current tax records indicate the property located at 3129 West Friendly Avenue is owned by Carl Essa. Steve Uwanawich and Doreen Gordon are the tenants and the applicants. The lot is located at the southwestern intersection of East Avondale Drive and West Friendly Avenue on zoning map block sheet 47. The lot is currently zoned RS-12. The lot contains a single-

family dwelling. On August 15, 2005, the applicants were issued a Notice of Violation for operating a

a home occupation that does not comply with the Hamilton Lakes Merger Agreement. On August 25, 2005, the applicants appealed the Notice of Violation. On August 2, 2005, the applicant applied for a Privilege License for a home occupation. The application was sent to the zoning office for approval and was denied because of the location, which is in the former Town of Hamilton Lakes. By Act of the General Assembly, the Town of Hamilton Lakes was merged into the City of Greensboro on July 1, 1957. The merger agreement at the time of annexation will not run out until January 1, 2007. This agreement limited the Hamilton Lakes residential property owners and/or their tenants from having home occupations. During the first two weeks of August, the Zoning Department received numerous complaints from the neighborhood concerning the home occupation. The applicant placed a sign up on the front wall to advertise the business. At that time a Notice of Violation was also issued for the sign. The zoning office has continued to receive complaints on a weekly basis concerning the operation of the home occupation. The adjacent properties are also zoned RS-12 and the properties located on the north side of Friendly Avenue are zoned SC. He called the Board members' attention to a portion of a document that they had relative to this. There is some highlighting wording in there that refers to the Hamilton Lakes Residential District and it specifically addresses what uses are allowed under the merger agreement and anything that is not listed is not allowed and a home occupation is not listed.

Chair Holston opened the public hearing.

Marc Isaacson, Esq., 101 West Friendly Avenue, was sworn or affirmed. He handed up some materials for the Board's consideration. He said he would address Counsel Carr's question. They were not asking for a use variance, they were here because the City issued a Notice of Violation and they have appealed that and were asking that the Board overrule that and determine that the home occupation currently being used by the appellants is a legal use. At the end of his presentation, he would be, for the record, asking that the Board dismiss the Notice of Violation on one or more procedural grounds after reviewing the merger agreement between the City of Greensboro and the Town of Hamilton Lakes.

Mr. Isaacson said he would first frame the issue for the Board and then they would move forward. The issue he believed for the Board to determine is whether a home occupation at this property on West Friendly Avenue is in violation of the contract by which the Town of Hamilton Lakes was merged with the City of Greensboro in 1957. He then referred to the entire contract between the City of Greensboro and the Town of Hamilton Lakes and read pertinent parts. He disagreed with Counsel Carr's description of this as an annexation. It doesn't say there is an annexation going on here and further it doesn't say that the City of Greensboro is required to enforce these rules. In fact, in Item 4, it says this contract is for the benefit and protection of the residents of and owners of property within the present corporate limits of the Town of Hamilton Lakes.

Mr. Isaacson said Ms. Gordon was here to answer questions. Ms. Gordon's activities at the property are what are in question here. Ms. Gordon is involved in astrology. Eighty (80) percent of her work is done by telephone. She has very infrequent visitors to this property, two to five per week, sometimes none on any given day. No products are manufactured or sold or distributed on the property. He thought it would be fair to say that it is clearly incidental to or ancillary to their living at the property as a primary residence.

Mr. Isaacson referred the Board to the next section in his handout, which was the ordinance of the

City of Greensboro, which discusses home occupations. Under 30-5-2.47, there are several conditions or terms under which one living in a property in a residential district in the City of Greensboro now can engage in a home occupation.

The question here is that a person occupying residential property in what was the Town of Hamilton Lakes, which has merged with the City of Greensboro, and is engaging in a home occupation that is clearly incidental to the primary purpose, which is living there, is that in violation of the law? He submitted that in contrast to what the Board had heard that it is not expressly prohibited. The home occupations are not expressly prohibited and instead the language in the ordinance is that it cannot be used for any industrial, manufacturing, trade or commercial purpose, but has to be used for a single detached residence for not more than one family unit.

He said Ms. Gordon was available to answer any questions of the Board. He mentioned that based on the evidence submitted to the Board and the merger agreement, the contract between the Town of Hamilton Lakes and the City of Greensboro that this matter is one for the owners of property within that jurisdictional limit, the Town of Hamilton Lakes jurisdiction, that if they so desire to file a civil action to prohibit or prevent the use of this property for this type of home occupation, they have every right to do so and that matter would be heard in the Civil Courts. The City of Greensboro is not required to enforce that, that is a contract between those two parties and he would renew the Motion to Dismiss on that basis as well.

Counsel Carr said she would point the members of the Board to Section 3 of the first page of the agreement under the words, "Witnesseth." As soon as practicable after this contract becomes effective, as provided in paragraph 2, the City shall cause the property within the present corporate limits of the Town to be zoned and restricted as follows -- then it goes on to recite the restrictions, some of which Mr. Isaacson read and in the paragraph that he is reading, there is more to that paragraph. Yes, it does say that, "In whole or in part shall not have industrial, manufacturing, trade, commercial purposes or for any other than the following specific purposes" and those specific purposes are listed.

Mr. Isaacson said he begged to differ with Counsel Carr, It doesn't say that the City will enforce that. It says it will be zoned and restricted for the purposes of this agreement. So he doesn't see where the City has to enforce this. And further, he would renew his argument that a home occupation was contemplated and is contemplated within the uses here to not prohibit it, it's not expressed authorized, but it was not expressly prohibited here.

Mr. Holston asked if "incidental" wouldn't be "in part?" Mr. Isaacson said he thought that depends on the degree of use. He thought that was a question for the Board to determine, but he thought that was a question of degree. How many cars are pulling up there every day, are there products being sold here?

Mr. Ruska said the agreement expired in 2007. The current restrictions on home occupations in the City of Greensboro do not pertain to the residential district of Hamilton Lakes. In 2007 when they expire, they would be less restrictive than what they're currently under. Mr. Ruska said again he would go back to what Counsel Carr pointed to you. It says: "The City shall cause the property within the present corporate limits of the Town to be zoned and restricted as follows:" and A refers to Hamilton Lakes Residential District and you have the list of uses that was agreed upon in the

merger agreement. Home occupations or using residential property for gain are not listed. In fact in

part of that it talks about using the property for no gain.

Mr. Parmele asked if there were any signs on the property advertising the services? Mr. Isaacson said there is a sign that's posted, affixed to the front of the house

Mr. Pinto said, assuming that the Board does not buy the "City doesn't have the authority to do what they are trying to do" argument, as he understand Mr. Isaacson's position Sub-paragraph D(1) says that: "Single detached residences are allowed in Hamilton Lakes," and you want us to take a look at the current Greensboro standards as far as what incidental uses can be made that would be assumed in single detached residences? Mr. Isaacson responded, "That's correct."

Speaking in opposition to this request, Jim Collins, 202 Erskine Drive East in the Town of Hamilton Lakes, was sworn or affirmed. His wife had a business that she wanted to run out of her home and could not so she rented space elsewhere. He came to the Planning Department to ask if it would be permissible since they had a large lot and all kinds of space to put a home business in of that sort. He could not do it because it would be in violation of the Town of Hamilton Lakes Agreement, which is a State law as he understands, not a City ordinance. His father is 89 years old and would like to live with them. Later on he wanted to build an apartment behind his garage. There was 200 feet behind his garage that could accommodate a nice apartment that his father could call his own. He came to Zoning and was informed he could not do that. This is clearly an intrusion; it is clearly in violation of State law. He did not see any reason why it should be permitted.

Chair Holston asked if there was anyone else present to wished to speak and no one came forward. He then closed the public hearing.

Chair Holston said they had a question of use and they have the merger agreement between the Town of Hamilton Lakes and the City of Greensboro.

Mr. Cross said and to answer the question Mr. Isaacson wants them to answer. The City of Greensboro is part of this contract and can enforce it.

Mr. Pinto agreed that the City of Greensboro could enforce it. The question is whether it's a violation.

The Board then discussed the merits of the case.

Mr. Cross said he was inclined to just make a motion as to whether or not the Zoning Enforcement Officer is upheld or overruled.

Mr. Cross said in the matter of BOA-05-44, he moved that the Zoning Administrator's findings of fact be incorporated into the record by reference and based on stated findings of fact, he moved that the Zoning Enforcement Office be upheld. Mr. Parmele seconded the motion. The Board voted 6-1 in favor of the motion. (Ayes: Holston, Buffington, Cross, Kee, Parmele, Pinto. Nays: Anderson.)

Chair Holston declared a five-minute recess.

B) BOA-05-45: 3404 WHITEHURST ROAD - CHEAP SEATS RESTAURANT APPEALS A NOTICE OF VIOLATION IN REFERENCE TO THE USE OF THE PROPERTY FOR A

BAR/NIGHTCLUB. THIS PROPERTY IS ADJACENT TO RESIDENTIALLY ZONED PROPERTY WHEN A 200-FOOT SEPARATION IS REQUIRED AND ALSO HAS INSUFFICIENT PARKING FOR A BAR/NIGHTCLUB. SECTIONS 30-5-2.18 & TABLE 30-5-3-1, PRESENT ZONING-SC, BS-83, CROSS STREET-WESTRIDGE ROAD. (INSPECTOR UPHELD)

Mr. Cross said he had another conflict. Reid Phillips, who represents Starmount Company in this case, is a part in his law firm. Mr. Cross was recused from this item by unanimous consent. (Ayes: Holston, Anderson, Buffington, Kee, Parmele, Pinto. Nays: None. Abstain: Cross.)

Mr. Ruska said Starmount Company is the owner of the property located at 3404 Whitehurst Road, which is currently operated by Cheap Seats Restaurant. The lot is located on the north side of Whitehurst Road west of Westridge Road on zoning map block sheet 83 and is zoned SC. On September 9, 2005, the applicant was issued a Notice of Violation for operation of the property as a bar/nightclub, which is not a permitted use at this location and which also does not have sufficient parking spaces to support a bar/nightclub use. The permitted use and the approved privilege license for this location are for a restaurant. On September 26, 2005, the applicant appealed the Notice of Violation. On August 30, 2005, the zoning office received a complaint from a neighborhood citizen that the property was used as a bar/nightclub and was causing parking problems in the neighborhood. On or around this same date, the zoning office was contacted by Building Inspections and asked if the zoning office would approve a SRO (Standing Room Only) occupancy for this location. This would allow the restaurant to remove or shift their seating and tables to allow more people to occupy the building. Standing Room Only does not meet the interpretation of zoning requirements for a restaurant. Their current posting for maximum restaurant occupancy is 389 persons. Included in each member's packet is a copy of a fire marshal's report dated August 14, 2005, which includes a copy of a citation for \$8,400 dollars for exceeding the posted capacity by 54 persons and blocked exits. On August 14, 2005, the report indicates there were 443 persons inside the building. The time on the citation was noted as 0056, which is 12:56 A.M. Also included is a copy of a police report that shows a complaint was filed against this location on August 18, 2005 for large crowds, trespassing, and noise disturbance. Another citation for failure to maintain occupant load at or below the maximum posting was issued on this date at 2:30 A.M. On September 12, 2005, Loray Averett, Zoning Enforcement Officer spoke with Cheap Seats Manager, Tamika Harrington. Based on the conversation, Cheap Seats contracts out to promoters for Special Events that are bar/nightclub oriented. Ms. Harrington asked if it is permissible if they do Special Events on a weekly or monthly basis and use the property the rest of the time as a restaurant. She was informed that it is not permissible and the property can only operate as a restaurant that is the approved use for the property. Their website advertises that Friday nights at Cheap Seats is College Night with a cover charge \$5 for women, \$7 for men after 11:00 P.M., and DJ entertainment until 2:00 A.M. A copy of this advertisement was downloaded and placed in each BOA member's packet. On September 23, 2005, the zoning office received a copy of a letter addressed to Starmount Properties from Cheap Seats (operating tenant). The letter states that other restaurant properties do the same thing Cheap Seats is doing. The zoning office has received complaints on other restaurant locations and each complaint is investigated and appropriate determinations are made based on Ordinance requirements. On October 4, 2005, the zoning office received information that a large disruptive party was held on the premises on October 1, 2005 (Saturday night). The complaint was shared with zoning by the Police Department

and also several citizens from the neighborhood called to complain. The neighbors complained about the loud noise, parking the cars in a manner that blocks the streets, and trash being thrown in the

the area. A bar/nightclub is not a permitted use on the property. Section 30-5-2.18 **Bars:** (B) *Property Separation*: "No such establishment shall be located within two hundred (200) feet of a church, elementary or secondary school, public park, or residentially zoned property." This property is adjacent (zero foot separation) to residentially zoned property. The separation must be from property line to property line and not from the structure to the residential zoning line. The intent for the property line to property line separation was to include parking lots in the spacing since parking lots associated with bars can be the source of disruptive activities. The parking requirements are also impacted. Based on the square footage of the building, this restaurant requires 127 spaces, and a bar/nightclub use would require 254 spaces to be located on the same zone lot. The site currently provides 133 spaces, which is adequate for a restaurant, but not for a bar/night club. On September 9th, 27th, and October 14th, 2005 the zoning officer working the area during peak lunchtime hours noted that there were only a few cars on the lot. Attached are photographs of this property dated September 27, 2005 at 12:30 P.M. The adjacent properties located to the west are zoned CD-RM-8, the adjacent properties located to the north are zoned RS-12, the property located to the east is zoned SC, and the properties located on the southern side of Whitehurst Road are zoned RS-12 and CD-RM-8.

Chair Houston opened the public hearing.

Charles Blackman, Esq., 108 North Elm Street, represent the appellant in appealing the Notice of Violation and was initially going to request a continuance in light of the fact that he was only retained this morning, but he was ready to proceed and would respectfully ask to hold the record open, if necessary, to submit reports that might reach some sort of adjudication with respect to these issues.

Mr. Blackman said the violation presumes that Cheap Seats is operating as a nightclub and they would contend that that is an error. Cheap Seats has been owned and operated by an LLC, J&J Premier. Ms. Monica Lassiter, one of the members, is present. Her partner and fellow member owner, Tamika Harrington was here earlier, but had to leave. They also have Matt Brown, who is present, who acts and serves as a general manager of Cheap Seats. Both of these individuals will be available for any questioning the Board might have.

Cheap Seats is open seven days a week, not three or four days, not weekends like a nightclub. It is open each day from 11:00 a.m. for lunch to either 10:00 p.m. or 2:00 a.m., depending on the night. It meets the criteria of alcohol law enforcement, the 70/30 ratio, and he handed up a report to the Board and apologized for its not being bound.

Mr. Blackman said that report was generated from a report to Cheap Seats cash register system, which logs alcohol sales, food sales, and is a good indication of what they actually sell, what the percentages are with respect to sales in the establishment. He said it would show that alcohol sales are 51 percent of the gross income and food sales are 49 percent. That runs from June 2005 through the present. J&J Premier has only owned and operated the restaurant since June of 2005. Under the jurisdiction of the Guilford County Health Department they have an "A" rating. The rating was 94.5. Nightclubs and bars are not under that jurisdiction.

Certainly Cheap Seats has special events night like many other successful restaurants in Greensboro. Other facilities have live bands, karaoke, T-shirt contests, video game nights and this is

is no different. They operate as a sports restaurant. People go there to watch football games, to watch major league baseball games, to eat hot wings. It is not a nightclub. The law is if they are selling a higher percentage of food than alcohol, it is a restaurant. All the licensing that they possess is that of a restaurant. He would submit that if some of the complaints that Mr. Ruska read to the Board were to be entertained here, it would be in the improper venue. Those are things that are typically addressed in a nuisance abatement action. That is not what they are here for today. They are here to determine whether or not Cheap Seats is operating as a nightclub and it is not. If it is not, there is no violation. There is no violation with respect to the setback from the residential area and there would be no violation with respect to the parking, which is more than ample with 190 spaces for a restaurant. They have 35 employees. He submitted that with a nightclub, they would not need 35 employees. He handed up their Employee Manual, which addressed dining room etiquette, and their most recent food wholesaler for the month of October, which totals \$15,600. He submitted that these are not facts indicative of a nightclub. This is, has been and will remain a restaurant. He felt that a lot of what Mr. Ruska read into the record would be inadmissible and the Board should not consider anything other than matters relating to the building and the structure itself. Neighbors' wants and desires, the police's thoughts about what transpired there again he respectfully submitted would be inadmissible in this body. So they would respectfully ask that the Board find that there has not been a violation, find that Cheap Seats is operating as a restaurant and reverse the violation order.

Members of the Board asked several questions of Mr. Blackman, which he answered.

Chair Holston asked if there was anyone who wished to speak in opposition to this matter.

Reid Phillips, Esq., 230 North Elm Street, was sworn or affirmed. He said he represented Starmount Company who had leased this property under a 10-year lease in December of 2001 to be used for a restaurant only. Starmount is very disappointed in what has happened beginning about July of this year when Starmount began receiving numerous complaints from people who were saying it was being used as a bar and a nightclub. They think the evidence is pretty clear that it is being used as a bar and nightclub when you consider the hours of operation, the fact that a cover charge is being charged, and the fact that tables and chairs are being removed or stacked up to put more people into the property, as well as the fact that you have people coming and going for short periods of time, unlike a sit-down restaurant where you expect someone to go in and sit for 20 minutes to a hour to have a meal. So it has all the indications to them that it is being used as a bar and a nightclub. They are very unhappy with that. They are supportive of the residents who oppose that and they think the Board should find that this is a clear violation.

Lee Skidmore, 4412 Gloucester Lane, was sworn or affirmed. He would like to say that since Cheap Seats has started these Friday and Saturday night events, it is basically impossible to go to sleep before 3:00 in the morning. He had personally run people out of his neighbors' yards who were urinating in the yards. This place has restrooms. He then explained the conditions in the neighborhood, especially on Friday and Saturday nights. He has called numerous times to the Police Department about it. His wife actually called last weekend. After 30 years of living here, he bought a home in a \$150,000 to \$200,000 neighborhood and now he has to worry about gangs and

gunfire. This has been a very quiet and serene residential area. With the gunfire going on up there, he could only see that it is going to continue and with more people it will get worse. He was dead set

set against Cheap Seats and to see this restaurant continue to him was just untenable.

Mr. Skidmore said he could not tell the Board the actual operating hours, but it was well after 3:00 in the morning before the noise stops. He said they were probably open for lunch, but there were very few people there during normal restaurant hours. When you really see them doing business is on Friday and Saturday nights and the worst thing to him was when he saw the WQMG van pull up in front of place and start unloading their audio equipment. Then you know that you are going to have cars, people honking and screaming and yelling and lately gunfire in their neighborhood.

Anna Marie Rogers, 1902 Downing Street, was sworn or affirmed. There are townhomes between her home and Cheap Seats. When the restaurant was erected, the land was pushed up behind the restaurant to create a buffer. Even with this buffer and the townhouses, they still hear everything that goes on at Cheap Seats. She then explained to the Board what her life was like as a resident coming in and out of the neighborhood and her observances over the last few weeks. Her 16-year-old daughter recently had to show identification to get to her home. One of her neighbors who is a oral surgeon was called out one night on an emergency. He could not get through the people in the street who would not allow his vehicle through. He had to back up and exit the neighborhood through a different entrance. Another neighbor is a pilot and works odd hours. He has also been blocked from exiting the neighborhood as well. The patrons and the owners of this establishment just show disrespect for their neighborhood. She said if there was not underage drinking going on in the establishment, it is definitely going on outside based on the trash that is left

Matt Brown, 2 Sidney Marie Court, was sworn or affirmed. He said their days and times of operation were on Monday, they are open from 11:00 a.m. until the football is over on Monday night, so that is around 11:30 p.m. Then Tuesday they have a karaoke night so they are open from 11:00 a.m. until 2:00 a.m. Wednesday they have kids night so they are open 11:00 a.m. until 11:00 p.m. Thursday they have appreciation night so they are open from 11:00 a.m. until 2:00 a.m. Friday, some nights they have college night so they are open 11:00 a.m. until 2:00 a.m. Saturday, they are open 11:00 a.m. until 2:00 a.m. and Sunday from 11:00 a.m. until the football game is over on Sunday, which is usually 12:00 midnight. Those are published hours. They serve lunch. They take reservations. They have wedding parties and birthday parties. He had been working there for four and a half or five months now. When J&J took over, that was when the hours changed. It was Thursday through Sunday, but now it is seven days a week and they open at 11:00 a.m. He was not sure why it was currently padlocked; he thought there was a discrepancy with the rent or something. The landlord padlocked it, not the owners. Carl Wrenn is the owner of the building.

Mr. Parmele asked the representative of the Starmount Company if they were the manager of the property or the owner? Mr. Phillips said it was a ground lease. They just lease the property to Henry James Barbecue, which was doing business as Steak Street. He understood they had made some assignment or some arrangement with the current folks and so when there was a reference to the padlocking, he assumed they haven't paid their rent to the person to whom they leased the property. There are three entities in the chain, if you will. State Street was a restaurant and they had no complaints from its operation.

Chair Holston closed the public hearing.

Ms. Buffington said didn't know of any restaurants that stay open those hours, true restaurants. There must be something happening besides food to keep you there until 2:00 and 3:00 in the morning.

morning.

In response to a question from Chair Holston, Mr. Ruska said in this particular instance the things that they are concerned about is 1) they applied for a "Standing Room Only" occupancy and what restaurant would apply for standing room only and push tables and chairs aside. What restaurant hired a DJ? There has been testimony that a few restaurants have a cover charge. He had never been to a restaurant where he had been asked to provide a cover charge. They have no doubt that if they are open for lunch, their clientele is very sparse although they may serve lunch and the establishment may be a restaurant at that point, but their contention is that sometime in the latter hours of the evening that they switch over and they become a bar or a nightclub. That is when they cross the line as far as the zoning ordinance is concerned because we require that separation from residentially zoned property, 200 feet from property line to property line, and they don't meet it on three sides. So they can't be a bar or a nightclub. They were permitted, as Mr. Phillips said, originally as a restaurant and they met the parking requirements for a restaurant. That restaurant went out of business for whatever reason and Cheap Seats has moved in. Staff's contention is that they operate as a bar and nightclub in violation of the zoning ordinance. To see the difference between a bar and a restaurant, you have to look at the operational characteristics of it. There is not a definition for a restaurant. In that case you use the common and ordinary meaning of it, but we do have a definition of a bar and that is "an establishment primarily engaged in the retail sale of beer or wine for consumption on the premises. Such establishment must obtain an ABC license for on-premise beer or wine consumption only. The establishment may also be engaged in the retail sale of prepared food for on-premise consumption."

Mr. Pinto said he thought that was a factor they could consider. He also thought you have to look at all of that and some of the evidence was some other people have said this and that. I guess we can weigh that as much as we want to weigh it. And if you are a restaurant, you really don't have a lot of control. If a lot of people tend to come there late and you are open late, if you're still selling 50 percent food, maybe you still retain the right to be called a restaurant. He questioned whether that was true here. It sounds like a bar. He guessed they would have to listen to all the evidence and say, "Is that still a restaurant or is it a bar?" He didn't know of any other standard other than factoring all of that in. He had never gone to a restaurant that charged a cover charge. He didn't doubt Mr. Blackman's representation that there are restaurants that would charge a cover charge. He had been to restaurants that have DJs or music playing.

Ms. Buffington said to her, it is a bar.

Mr. Pinto said it sounds like one. He thought the fact that they had taken the tables up and moved them out shows that they at least anticipate a lot of people coming at night and you are anticipating a lot of alcohol sales, not food sales. It sounds like a bar.

Ms. Buffington said in the case of BOA-05-45, based on the stated findings of facts that are part of this record, she moved that the Zoning Enforcement Officer be upheld and the appeal denied. Mr. Pinto seconded the motion. The Board voted 5-1-1 in favor of the motion. (Ayes: Anderson, Buffington, Kee, Parmele, Pinto. Nays: Holston. Abstain: Cross.)

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There being no further business before the Board, the meeting was adjourned at 5:11 p.m.

Respectfully submitted,

Hugh Holston, Chair
Greensboro Board of Adjustment

HH/ts.ps.